Patterson (Ed.)

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By EDWARD PATTERSON,

OF THE NEW YORK BAR.

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As Affecting Testamentary Capacity.

The conservatism of the law necessarily prevents its keeping pace with the progress of general science. It rejects everything that is merely speculative or tentative, and refuses to recognize, as a rule of action, aught that lies merely in the domain of theory or supposition. It rests upon authority for its highest sanction and support; and thus the results of the experiences and knowledge of one period have become formulated into rules and laws for the guidance and direction of succeeding generations. These rules continue to be operative long after the occasions which gave them origin, or the circumstances out of which they arose (or their parallels) have ceased to influence the conduct of men or the affairs of life. The jurisprudence of to-day is weighted with a multitude of practical anachronisms (if that expression may be permitted), many of them so closely and intimately inter woven with the texture of the system itself, that rashly to attempt their severance or extirpation would bring about the disaster of increased confusion and perplexity. The great desideratum of our municipal law is *certainty* of decision; and the necessity for the maintenance of this element induces the tribunals charged with the administration of this law, to adhere to ancient principles even although they are out of place, rather than to announce with precipitancy the inutility or unfitness of those principles as criteria of rights, obligations or responsibilities. The liberation of a principle of

law from the entanglements of antique limitations; the extension of that principle or of some engraftment upon it to cases which could not have arisen when it was promulgated; the modification of rigid rules to meet new emergencies; the proclamation by judicial utterance that a rule has ceased to apply because the reason of the rule has ceased, are matters so difficult, requiring so much knowledge, intelligence and courage, that in the absence of legislation few Judges would assume the responsibility of attempting to accomplish them. "It is better to cling to old land-marks," it is said, "than to map out new boundaries;" and this undoubtedly describes the disposition of the average of the Judiciary. The radical changes in our laws during the last two centuries, which have been effected by causes other than direct and definite legislation, are not numerous, except as they may have arisen from the development and extension of the jurisdiction of Courts of Chancery, and the adoption of equitable remedies. Indeed it may be rightfully claimed that the whole of our Equity jurisprudence, historically considered, is nothing but the record of the triumphs of reformers over this tendency of the law to stagnate; these victories being wrought into a system of practical devices to correct the inflexibility of common law dictates. The insufficiency of these devices to answer any purpose of permanent improvement was, however, soon made manifest, for they in their turn, acted upon by the habit of the Courts, soon passed into authority and became obdurate and unyielding rules. The words of Sir Thomas Browne are as appropriate now as they were two hundred years ago: "The mortalest enemy unto knowledge, and that which has done the greatest execution upon truth, hath been a peremptory adhesion unto authority, and more especially the establishing of our beliefs upon the dictates of antiquity. For (as every capacity may observe) most men of ages present so superstitiously do look on ages past, that the authorities of the one exceed the reasons of the other." [Essay on Vulgar Errors.]

The incongruities and ineptitudes in the relations between authority and the demands of society for appropriate laws to regulate the affairs of men as they actually exist and require government; furnish at once the impulse to and the difficulties in the way of intelligent and efficient law reform. The question is, how can certainty and uniformity of decision be secured and yet the system of jurisprudence be so moulded as to render it feasible to conform it to the changes which the rapidly advancing and varying civilization of modern times imperatively demands. The difficulties in the way of the solution of this question are, in the judgment of most thinkers, only to be obviated by the enactment of all necessary rules in the shape of a consolidated code, like the Code of France, or the unadopted Civil Code of the State of New York; which shall supersede all the sources of the law as they are now resorted to, and which by reason of its compactness may present, in an accessible shape, the whole body of the law, and may also, because of its structure, from time to time, and without violence to or impairment of its other parts, be amended in any given particular as the exigencies of the times or the new experiences of the community may require.

The value of these observations will be apparent to the general lawyer, to whom many illustrations will at once occur. Their force will be appreciated by the gentlemen of the medical profession, if they will reflect upon the history of the efforts that have been made to establish proper views in the decisions of the Courts, upon the various departments of the subject which we designate by the generic term Insanity. What has already been said applies as well to the condition and history of our jurisprudence upon this subject as to any other topic of the law. It is true that the evil was substantially inevitable, and that it is idle to quarrel now with conditions which it is only our duty to endeavor to rectify. Palpable and gross errors are committed every day in the Courts of law on the subject of Insanity, which Courts

are constantly clinging to exploded notions, or discussing, as open questions, matters relating to mental phenomena which have long since been settled by the medical faculty. It were of course sheer folly to advocate the inconsiderate or rash departure by any Court, from the principles of decision which have guided it in the past, or even to urge an alteration until it can be shown that an adherence to those principles really operates an injustice; but that being susceptible of proof, it does seem something worse than absurd to go on groping with rush lights in darkened chambers of thought, when by simply opening the windows we may see by all the illuminating power of the sun. I fully appreciate the delicacy of applying the test in the first instance to determine what is and what is not genuine advance, and also the magnitude of the task of evolving general rules from a mass of individual cases, the details of each of which must necessarily differ from those of all others. It must be conceded likewise, that no one man is entirely equal to the work of rearing an acceptable and just system of jurisprudence on this subject of Insanity, although many understand it clearly in its physical and mental aspects and relations. What is to be accomplished in this way can best be done by some agency of skilled, patient, learned and experienced minds of the medical and legal professions, organised as this society is, or on some other plan of conjoint effort and labor; and whatever is done it will require the utmost circumspection to prevent too great a recoil in the wrong direction. It is a mere truism, but an important one, that anything that diminishes the prospect of punishment increases the inducements to crime; and whatever may be undertaken in the interests of humanity and in the progress of science, to correct the errors and mitigate the severities of the criminal law on the subject of insane malefactors, there will constantly be presented this difficult problem, viz.: How to strengthen the cause of public justice and morality, and at the same time preserve the rights and privileges of these unfortunates.

I do not purpose dwelling upon this particular topic longer, but who has not been impressed by the glaring wrongs that have been perpetrated in the name of the law upon the miserable and unfortunate? It is not very many years ago that the penal laws of christian and enlightened nations demanded the blood of victims whose real offences were no graver than the possession of understandings wrecked and intellects disordered. These were not the objects only of popular delusions and superstitions, against whom the malevolence of whole communities found fierce delight in wreaking "the injustice of revenge;" but they were people solemnly arraigned for ordinary felonies, carefully and temperately tried, and condemned upon well-grounded and time-honored and reverend dogmas of the law. They stood in the gloom of a general presumption that *every* man intends the consequences of his acts (which is but a half truth at best), and of what seems to have been accepted as a postulate that consequences are conclusive evidence of intention. It cannot be doubted that effects of acts alone, without regard to the office of the will in inducing those acts, have settled the adverse destinies of many persons, who, judged by our standards to-day, would be regarded as guiltless of intended crime. It is true that these occurrences transpired during periods of comparative ignorance; but it is likewise true that the condition of the law has been such as to render these things possible, long after the disclosures of science have made known that impulses to crime are sometimes uncontrollable, and may be the effect of obscure mental disease as well as the product of depravity. How unsatisfactory is the present condition of the law on the subject of Insanity as excusing crime, and how great are the needs of careful and well-devised methods for its amelioration, the objects and the efforts of this Society attest.

But it is not only with reference to crime that the imperfect condition of the law as to Insanity is displayed. There is current in the decisions of the Courts, and in the general

literature of the law, much of serious error respecting mental disease as influencing the testamentary capacity of the person affected by it. What is most noticable is that the state of legal knowledge and the result of judicial decision on this subject seem to fluctuate between opinions of a hundred years ago, and those of recent times; the former reäppearing and being reässerted when least anticipated, and receiving application and enforcement in most unexpected quarters; and more especially is this to be observed in those litigations the facts of which indicate that the person whose testamentary act is assailed upon the ground of incapacity to make a will was, or was supposed to be, the subject of that mental malady which is now known to be a distinct and peculiar condition, and to which we assign the designation "monomania." By some it is claimed that any delusion—and in many cases it is believed that illusions and hallucinations where they are persistent, disqualify a person from making a valid will; while others assert that the old dogmas as to absolute alienation of mind are the true rules of decision on questions of testamentary capacity. Neither of these views is correct, and it is my purpose this evening to trace in a very general way the growth of the doctrines of law properly applicable to wills contested by a testator's relatives upon the allegation of monomania, and to refer, although desultorily to the origin of those doctrines as exhibited in several of the principal litigations in which they have been enunciated; and to show that there is one just, reasonable and sufficient rule to cover all such cases—a rule however which, although it has received the approbation of the cultured minds of the two professions most interested in its maintenance, is nevertheless very often entirely ignored by Judges in cases as to which no other rule can in consonance with justice be applied.

The general inquiry in all investigations concerning the mental condition of a testator should be, Was or was not the individual *compos mentis*, at the time of the performance of

the testamentary act? This is substantially the test as adopted by the Court of Appeals of the State of New York. That Court in the Parrish Will Case (Delafield *v.* Parrish, 25. N. Y. 97), a majority of the Judges concurring, held that "in law the only standard as to mental capacity in all who are not idiots or lunatics, is found in the fact whether the testator was *compos mentis*, or *non compos mentis*, as those terms are used in their fixed legal meaning." A lunatic, or one who is the subject of general mental derangement, is absolutely *non compos mentis* and cannot make a valid will, except during the supervention of a lucid interval. He is "one who is subject to a continued impetuosity of thought which, for the time being, totally unfits him for judging and acting in relation to the affairs of life, with the composure and deliberation necessary to their maintenance and proper discharge." The law disqualifies such a person from performing a testamentary act (just as it would, but upon less stringent evidence, exonorate him from responsibility for an action which under other circumstances of commission would be criminal), unless it be shown that at the time of making the will there was a remission of the disease. It may not be inappropriate to remark in this place, that there is a sceptical disposition abroad on this subject of lucid intervals. The question is mooted as to whether they really occur—whether there is any other condition than that of the presence or absence of the mental disturbing cause. If mental maladies are attributable to structural changes in the brain, it seems strange that there should be a suspension or cessation of the processes, or the effects of processes operating such a change, and which suspension or cessation is merely temporary and intermittent; but the doctrines of the law on this matter are deeply laid, and now seem to be of general acceptance in the Courts.

That unsoundness of mind which is involved in all judicial inquiries as to a testator's ability to make a valid will may be either of two descriptions, viz.: general insanity or partial insanity. The recognition by the law of these divisions,

which shortly necessitated the adoption of a rule specially adapted to each, marks a great and important era in the judicial history of Insanity. Prior to the days of the American Revolution, the distinction, if taken by writers, or advanced by the more progressive and better-informed of the medical profession, had no favor in the Courts of law. Indeed, from the time of Sir Edward Coke through to Lord Hardwicke's time, the severest and most inclusive rule of testamentary privilege was enforced. The English Courts formerly entertained jurisdiction to avoid instruments upon allegations of mental incapacity only in cases of "a total loss of understanding," where "one by grief, sickness or other accident, wholly loseth his understanding," is the language of one of the oldest cases. In the Criminal Courts, some attempt had been made to establish the doctrine that limited insanity excused crime, but the effort was not successful; for it was held about the year 1725, in the case of Arnold, that insanity as a defense to an indictment must amount to a total deprivation of understanding and memory, so that a man could be no more conscious of the probable effects of his acts than an infant or a brute. The ruling in this case has furnished Dr. Maudsley with his very expressive phrase, the "wild beast" theory of responsibility for crime. In investigations under writs *de lunatico inquirendo*, partial insanity had been adjudged sufficient to authorize the sequestration of property and its transference to the charge of a committee; but I am considering the history of the subject in strictly testamentary cases, and in such cases only.

The extended and enlarged jurisdiction in which the partial insanity of a testator was recognized as sufficient cause for the avoidance of his will, seems to have originated after the retirement of Lord Hardwicke from the Chancery in 1756. In *ex parte Barnsby* (3 Atk.), that illustrious Chancellor held, that "*insanæ mentis*" (a term then used to designate what we now call a lunatic), "*non compos mentis*," and "*unsound mind*," are synonymous expressions. Hence

a man, to be incompetent to devise or bequeath his property, must have been substantially a lunatic. The distinctions are not apprehended between partial and total insanity, and it is not until the case of Mr. Greenwood, in the earlier years of the reign of George Third, that we have a distinct foreshadowing of the doctrine which has become so vital and necessary in these days.

Before proceeding further, let me refer to the classification and separation into groups of the various forms of unsoundness of mind, as they are distributed in the terminology of the medical profession.

Esquirol (*des Malades Mentales*) distributes these morbid mental phenomena into five classes, viz.:

1. Melancholia.
2. Monomania.
3. Mania.
4. Dementia.
5. Idiocy or Imbecility.

This distribution or classification is accepted and adopted by the most eminent writers upon these subjects. Dr. Hammond quotes Esquirol with approbation in his most lucid and admirable monograph on "Insanity in its medico-legal relations," a production which, in connection with the facts and circumstances of the contested Will Case of James C. Johnston of North Carolina, furnishes one of the most instructive and satisfactory contributions that have been made to the literature of the subject of Monomania. I regret that for want of time further reference to this case of Johnston (which would well illustrate some of the views I shall hereinafter present) must be omitted.

The first and second of the classes falling under the distribution of Esquirol, viz.: Melancholia (which is defined by a quaint writer as "sadness without a reasonable cause,") and Monomania, belong to the division of partial insanity, and Monomania often borders upon Mania.

To define with some attempt at clearness the respective conditions of general and partial insanity may be of service. If I might venture a definition of my own, I would describe general insanity to be that aberration of mind, the result of grief, disease or accident, which prevents the subject of it from using his reason, or which substitutes for the clear operations of the mind a morbid fancy, a perverted understanding, a delusive apprehension of the affairs and business of life, whence arise an unstable judgment, an infirm, feeble, vacillating will; a diseased and fantastic imagination, wholly irrational and abnormal.

Partial insanity is that condition of mind in which the individual is rational and intelligent on all subjects except the particular topic or class or system of topics as to which he labors under delusion.

The form in which partial insanity is presented to the notice of Probate Courts, and generally in testamentary cases, is almost always in connection with monomania alone.

Esquirol defines Monomania to be, "perversity of understanding limited to a single object, or small number of objects, with predominance of mental excitement."

Each of the two chief divisions of mental incapacity, has applicable to it its peculiar and distinct rule of law:

1st. Where the evidence shows the testator to have been totally insane shortly before the time of the execution of the will, testamentary incapacity is presumed to have existed *at* the time of its execution, and the *onus probandi* is thrown upon those claiming the validity of the instrument to countervail this presumption by evidence of a lucid interval during which the testamentary act was performed.

2d. In the case of partial insanity, or partial unsoundness of mind, generally evinced in the form of monomania, it devolves upon the contestants to show, *that the will is the direct offspring of that insanity*, or in other words, the burthen of proof is upon the contestants to show that the partial insanity existed at the time of the execution of the will,

and that to its existence and its operation in and influence upon the mind of the testator their disherison is to be attributed.

As before stated, the earlier adjudications are silent upon the distinction between general and partial insanity. As clearly defined and as generally accepted as these distinctions seem to be now, to those who have studiously considered the subject, nevertheless, the same relation back to the conceits of the past—entirely inappropriate and out of accord with modern discovery, and the *real* requirements of the present—appears on this subject in very recent cases. As an example, I select from among several lately examined, that of *Stackhouse* v. *Horton*, 15. *N. J., Ch. R.* 202. By this case it would seem that there are but few if any restrictions upon the testamentary acts of those partially insane. The case seems to have been well decided as to the immediate facts involved, but the learned Chancellor in the course of his opinion sees fit to lay down as a broad principle that "a person may be the subject of a partial derangement toward a particular person, and this derangement may be the cause of depriving such individual of the bounty of the testator, which he otherwise would have enjoyed, and yet the will made by such a person be valid." I refer to this declaration of the law, merely as an illustration of how fixed is the disposition of even the most competent magistrates to seek shelter under the shades of antiquated rulings, and to impress the fact as pertinent to the present subject, that this tendency to revert to the rules of the past is one of the causes of so much of practical error in our present modes of administering justice. The doctrine of the Chancellor in the case referred to, unlimited and unrestrained, would sweep away all the experience and progress of quite fifty years, upon the subject of which he was treating, and could only find its justification in the assumption that there is no verity in any other rule than that ancient and exploded one, that total insanity is alone a cause of testamentary incapacity.

It is quite incompatible with the design of this paper, to refer to any great number of adjudicated cases, for time and space will not allow it. For the same reasons, I must intermit any use of the text writers for a similar purpose. I will therefore consider but a few of the decisions of Courts, and only such as will serve and are necessary to the purpose of sufficient presentation of the subject under discussion.

The first, and for that reason the most conspicuous litigation relating to the distinction between the two classes of insanity, is not fully reported in any book, and so far as its details are concerned, it may be called merely traditional. Nevertheless, because of its definition of principle, and clear enunciation of a new rule, it is more frequently cited by Judges and counsel than any other case. Erskine in his argument to the jury in the trial of James Hadfield, speaks as follows: "The deceased Mr. Greenwood, whilst insane, took up an idea that his brother had administered poison to him, *and this became the prominent feature of his insanity.* In a few months however, he recovered his senses, and returned to his profession, which was that of a barrister, but could never divest his mind of the morbid delusion that his brother had attempted to poison him, under the influence of which (so said) he disinherited him. On a trial in the Court of Kings Bench upon an issue *devisavit vel non*, a jury found against the will; but a contrary verdict was had in the Common Pleas, and the case ended in a compromise."

The mental trouble with which Mr. Greenwood was afflicted, was clearly monomania—to his brother was his hostility limited; and it seems that it was an ever-present delusion that this brother was attempting to murder him. Lord Kenyon, in charging the jury is reported to have said, "If you think that whenever that topic occurred to him it *totally* deranged his mind, and prevented him from judging of who the objects of his bounty should be, according to his own will, then the will cannot stand; but if you think he was of competent mind to make his will, to exercise his

judgment, however that might be disturbed by passions which ought not to be encouraged, then the will ought to stand."

This case is probably entitled to be regarded as the pioneer of the correct rule of law on the subject of partial insanity. There was proof in the case of a restoration to health, sufficient to enable Mr. Greenwood to resume the practice of his arduous profession. Under the old rule his will would have been valid, and even under Lord Kenyon's charge the condition of *total derangement of mind*, superinduced by the one subject of delusion, was required as the belief which the jury must entertain before pronouncing against the will. This phrase, "totally deranged his mind," in the connection in which Lord Kenyon used it, is very significant. The learned Judge was not willing to proceed to a radical change in his definitions. He did not care to pronounce that Mr. Greenwood may have been entirely sane on every other subject of mental contemplation, except his relations to his brother, and yet, if, as to those relations, he entertained delusions which were so inveterate in their character as to induce him to exclude that brother from a share in his bounty, he could not make a valid will; but he approximates it by holding that if as the disturbing cause operating a dethronement of reason, he entertained this aversion to his brother, then that delusion disqualified him from making a will. The consequence and effects of the diseased intellect, astray only as to one subject or class or system of subjects, were, in the estimation of Lord Kenyon, to be of so serious and all-pervading a character as actually to unsettle all the mental processes during the period of the presence and operation of the one cause of disturbance. Here are displayed errors very natural to the incipiency of the subject. Lord Kenyon evidently contemplated two things as associated with monomania, which have since been ascertained to be not characteristic of it: *first*, that it affects the mind always as if it influenced all mental operations during the times of its manifestations, utterly preventing the use of reason during

those times; and *second*, that there are periods of remission analogous to or really constituting lucid intervals.

Before the new ideas thus introduced on the precedent of Greenwood's case, could be utilised and commended for general adoption in similar cases, it became necessary to relieve the rule of what was yet cumbersome and unphilosophical in it. This was done, and the law further fashioned in another celebrated case in England, constantly referred to in the books, and cited as *Dew* v. *Clark*. This is very justly considered the leading case on the subject, and will, therefore, permit a few moments consideration of its history.

It was twice at bar in the Prerogative Court of Canterbury, before Sir John Nichol. It came up originally in Trinity Term, 1822, on an application made by the contestant for leave to set up a plea of partial insanity as invalidating the will of a Mr. Ely Stott, who had conceived a monomaniacal dislike to, amounting to extreme hatred of his daughter, Mrs. Dew. The motion was opposed on the ground that partial insanity did not by the law of England incapacitate a person from making a will. The plea was admitted however by the Court, on the authority of Greenwood's case; nevertheless the intimation was quite direct, that it would be almost a hopeless effort to undertake to establish by proof all that would be required to support such a plea. The reluctance to depart from the theories of the past, although they were confessedly untenable, is here distinctly exhibited. Proofs were taken, and afterwards the cause came up for hearing upon them. It appeared that Mr. Stott made a will in 1818. A commission *de lunatico inquirendo* was sued out against him in July, 1821. He was pronounced a lunatic and to have been such since (but not prior to) 1st January, 1821.

It was proven that the testator regarded his daughter as "invested with singular depravity, a peculiar victim of vice and evil, the special property of Satan from her birth, etc." and that he had very peculiar religious views. The essential facts of the case, however, as illustrating the rule evolved

from them and enunciated by the Court, are those connected with the insane abhorence and detestation in which he held his daughter, and which undoubtedly were the causes of her exclusion from a share of his estate. In other words he was a monomaniac.

The decision of the Court on these facts is reported in 3. *Addams*. The syllabus of the case gives such an excellent epitome of the decision that it will suffice to quote it:

"Partial insanity is good in defeasance of a will founded immediately (so to be presumed) in or upon such partial insanity. If A. then makes a will plainly inofficious in respect to B., and *is proved at the time of making it to have been under morbid delusion* as to the character and conduct of B., the Court of Probate will relieve by pronouncing this will to be invalid, and holding A. to have died intestate."

From this case of *Dew* v. *Clark* we have received the only clear, just and practical doctrine of the effect of monomania upon testamentary dispositions of property. It establishes the rule recognized and enforced in the best considered subsequent cases both in England and America—not in the way of merely following the precedent, but upon careful and exact reasoning and argument. From these cases we ascertain that two elements must co-exist to afford sufficient ground for nullifying at the instigation of his relatives the will of a person afflicted with monomaniacal delusions.

First. There must be a plainly inofficious will; or a will lacking in natural affection and duty.

Second. There must be morbid delusion actually existing at the time of making, and undoubtedly prompting the provisions of the inofficious instrument.

As this rule has been accepted and applied under the special circumstances of almost all the English cases which have been decided since *Dew* v. *Clark*, and in which the subject was involved, it will be unnecessary to make further citations. I would mention, however, that where there may *seem* to be departures from it, in such cases as *Waring* v. *Waring*, and

Smith v. *Tibbetts*, it will be found that those are strictly cases of general insanity. In the first of these cases the opinion of Lord Brougham has met with very severe animadversion.

The rule laid down in *Dew* v. *Clark* has found ready adoption and application in the American cases. I will refer only to two of three of them in which the doctrine has been very forcibly and satisfactorily set forth. The first is only a *Nisi Prius* case, but the views are advanced by a Judge of eminent learning and sagacity who so lucidly pronounces the rule, that it is evident he bestowed much time and thought upon it. In *Leach* v. *Leach*, 11. *Penn. Law J.*, King, Justice, in charging the Jury said:

"*A monomaniacal delusion inveterately entertained by a testator, against one who would otherwise have been the natural object of his bounty, and shown to be the reason which has excluded him from it, and to have had no other existence, except in the distempered imagination of the testator*, would invalidate a will made under such influence, and for the very plain reason that a will made under such an insane delusion is not what the law requires a will to be, viz: the product of a mind capable of reasoning rightly. For although the law recognizes the difference between general and partial insanity, yet if the will has been made under the influence of such partial insanity, and as the product of it, it is as invalid as if made under the effects of an insanity never so general."

. In *Stanton* v. *Weatherwax*, 16. *Barb.*, 259, Gridley, Justice, delivering the opinion of the New York Supreme Court, says: "A monomaniac may make a valid will, when the provisions of the will are entirely unconnected with and uninfluenced by the particular delusion. But when there is good reason to believe that the will is the offspring of that particular delusion, which has seized his mind and controlled its operations, the result is otherwise. A will thus made under the influence of a powerful delusion, which has not only impaired, but perverted his judgment and understanding in connection with the provisions of the will, so as to

exercise a controlling influence on the disposition of his property, is not the will of a person of sound mind. His mind is unsound *quoad* the very subject on which he is called to exercise his powers in making the will."

In *Seamans Friend Society* v. *Hopper*, 33. *N. Y.*, 619, Denio, Chief Justice for the New York Court of Appeals, says: "If a person persistently believes supposed facts, which have no real existence except in his perverted imagination, and against all evidence and probability, and conducts himself however logically upon the assumption of their existence, he is, *so far as they are concerned*, under a morbid delusion, and delusion in that sense is insanity. If the deceased in the present case was unconsciously laboring under a delusion as thus defined, in respect to his wife and family connections, who would naturally have been the objects of his testamentary bounty *when he executed* his will, or when he dictated it (if he did dictate it), and the Court can see that its dispository provisions were or might have been caused or affected by the delusions, the instrument is not his will and cannot be supported as such in a Court of Justice."

These cases and the reasoning applicable to the facts appearing in them, establish that in cases of partial insanity or monomania, unless the contestants can clearly trace their disherison to the delusion of the testator existing at the time of making the will, the legal presumption of testamentary capacity which always attaches until it is countervailed by express proof, is not overcome.

The rule with relation to disqualification from testatory power in cases of monomania as stated, finds as valuable illustration in causes in which delusions of a more or less insane character have been proven as isolated conditions, not directly affecting the wills or dispository provisions of those subject to them (and in which causes, therefore, the testamentary acts have been sustained), as it does in those in which from their circumstances the inference was inevitable

that the existence and operation of the delusions caused the testator to withhold his bounty from those who should have received its benefits. In the class of causes to which I now advert the delusions were generally of such a character as referred either to religious vagaries, or inordinate credulities as to supernatural phenomena, or other erratic ideas and convictions upon topics which we rightly term superstitions. In dealing with such subjects the Courts should decline to regard as satisfactory evidence of altogether perverted intelligence, the exhibition sporadically of those peculiarities of belief which formerly were incorporated in the creeds of devout men of various religions and nationalities. There can be no legal standard of normal religious faith—the world is too far advanced for that; but even in christianity, orthodoxy and heterodoxy have more than once changed places in the course of time, and the saint of to-day would probably have graduated in martyrdom a few centuries ago. Hecatombs have been offered up to appease the demand of the intellect of the world for the extinction of witchcraft. What more horrible impeachment of human wisdom than that defaces the history of our race? But yet occasional evidences of a pure and sincere belief in that fatal fantasy are presented to our observation among our own contemporaries. Although the tales, believed with all the earnestness of religious faith two or three hundred years ago, are scarcely enough to evoke more than a contemptuous smile from a strong-minded child; yet some weak minded men, entirely competent, however, to perform all the ordinary duties and make all the ordinary discriminations of life, give these or similar fables entire credence. These peculiar and infrequent cases, running counter to the sceptical, more enlightened and better instructed opinions of the times, are nothing more than isolated instances of what were earnest, deliberate and intensely believed articles of faith of such men as Popes Innocent 8th, Julian 2d, Adrian 6th; Sir Edward Coke, Sir Matthew Hale, Lord Bacon probably, Erasmus, Martin Luth-

er, Calvin, Baxter, Sir Thomas Browne, Cotton Mather, John Wesley. The belief in modern spiritism, with its puzzles and mysteries of mechanical or mesmeric effects, or whatever they may be, is entertained by many of the most subtle, acute and accurate minds—and yet, should the mere holding of these convictions and kindred infatuations, of the very essence of delusions to the accredited standard of rationality—no matter how fervent they may be and with whatsoever tenacity they may be held—be received as satisfactory evidence of that insanity which would vitiate a testamentary act—how repugnant would it be to our sense of justice? Every one of us would revolt against such a doctrine. But if such convictions, proven to have existed in the imagination, lead to the repudiation of the claims of nature and the ties of kinship, and to the establishment of professorships for the spread of spiritualistic knowledge, or to the foundation of a fund for the detection and punishment of witches, or to the diversion of property from those believed by a testator to be witches, or under satanic influences; or for the benefit of such very mortal immortals as Miss Katie King and her materialized spiritual comrades, recently first certified and then denounced by well known gentlemen in the literary and scientific world; then the delusion—shaping itself into a force, dominating the will, dictating the testamentary act, and turning away the current of feeling from those who should be the recipients of posthumous bounty—becomes a disqualifying cause, and avoids the will made under its influence.

The importance of these cases of delusions which are not connected with personal enmities and do not directly affect testamentary acts, as aiding in the elucidation of the subject of testamentary capacity cannot be over-estimated. It is in them that the tendency of Courts to err is most apparent. Finding that the aberration is given a wider range than such as would merely indicate a groundless personal hostility or some peculiarity eventuating in an inofficious will, the Courts are sometimes led to seek in these cases proofs of a general

insanity; whereas they are merely religious or superstitious humors, or highly individualized peculiarities of disposition or character. It is obvious that features analogous to monomania are manifested, and perhaps speaking with pathological exactness, they constitute monomania; but as they fall short of the legal requirements of that condition. as a cause of avoiding a will they must either be regarded as constituting a larger disqualification, or as being what they actually are in contemplation of law, altogether innocuous.

We all know of numerous cases in which

* * * * "Some one peculiar quality
"Doth so possess a man, that it doth draw
"All his effects, his spirits and his powers,
"In their confluxions all to run one way."

As a great English critic says, quoting the passage from Ben Jonson, "there are undoubtedly persons in whom such humors as Ben describes, have attained a complete ascendency. The avarice of Elwes; the insane desire of Sir Edgerton Brydges for a barony to which he had no more right than to the crown of Spain; the malevolence which long meditation on imaginary wrongs generated in the gloomy mind of Bellingham, are instances. The feeling which animated Clarkson, and other virtuous men against the slave trade and slavery, is an instance of a more honorable kind." It is safer to regard these, and cognate cases and indeed it would be gross injustice to do otherwise), as eccentricities, oddities, idiosyncracies—when they are not merely religious or superstitious conceits and humors.

Passing over even such very valuable cases as Banks *v.* Goodfellow, (in which Lord Cockburn has with his great ability and acumen fully considered the whole subject, and critically examined the English and some American adjudications), and many others in England which would well illustrate the proposition now under discussion, I will refer with some little particularity to two causes originating in our own Surrogate's Court, each of which is very instructive, and in which we can perceive the application of the correct rule.

The case of Thompson *v.* Quimby is reported in the second volume of Bradford's Surrogate's Reports. There were several reasons assigned by the contestants in this case, for their attack upon Mr. Thompson's will. Among them was the allegation "that the decedent was laboring under delusions amounting to insanity, and had not a disposing mind during the preparation or at the time of the execution of the will." The instrument was drawn and executed during his last illness, and but a short time before his death. It was a voluminous document, and in it some provision was made for many of his descendants and kinsfolk, mentioned therein; but the bulk of his large estate was left for charitable or religious purposes. The instrument was prepared by eminent counsel, and bears the evidence of very intelligent construction, it being simple in its scheme, although multifarious in its details. The testimony established that the testator was a believer in many superstitions of a vulgar character, and had held them with great pertinacity for many years. Among other delusions, it was claimed that he believed in the black art; that he read and experimented upon the teachings of books of magic; was familiar with disembodied spirits, that he could evoke them "from the vasty deep," or at least, like Owen Glendower, said he could, and that he declared they came when he did call them; that he could work spells by formula or incantation; that he could cure diseases by amulets or by papers bearing certain cabalistic inscriptions, which were to be worn about the person of the sufferer. He professed to know where Captain Kidd's treasures were secreted at Montauk Point, and actually in company with another, undertook by the aid of a divining rod to locate the exact spot, at which these riches were buried. The experiment was a failure, because as he declared the charm under which he worked was broken by inopportune remarks of his attendant. On one of these occasions, he beheld the apparition of the Devil (he had as much orthodoxy at least as consisted in a devout faith in that personage) in the shape of

a large black bull—he recognized the father of evil in his taurine manifestation. It was also alleged that he claimed to be able to see ghosts; that he believed in the supernatural character and significance of dreams; also in the Philosopher's stone, which was to be constructed of materials all of which he possessed except one; that he also believed in clairvoyance, spiritualism, mesmerism, magic glasses; that every person had three eyes, one spiritual and two physical, and that he owned a whistle with which he could get everything he wanted.

This and much more to the same effect was invoked as testimony to prove the insanity of the testator. While the Surrogate did not accredit all that was deposed to in this connection, he did arrive at this conclusion, viz.: "after making every reasonable allowance however, I have no doubt but that Mr. Thompson's mind was impressed with a sincere belief in many absurd notions. There seems sufficient evidence to show that he believed in mesmerism, clairvoyance, divining and mineral rods, dreams and spiritual influences. He searched for the supposed deposits of money by Kidd, and ascribed his failure in two instances to the utterance of certain words by the operator. That he said he saw the Devil in the shape of a bull seems to be well established. He believed likewise in the efficacy of cures for rheumatism and fever and ague as above stated."

On the other side, it was shown that the testator was a very shrewd and intelligent man of business, clear of vision and firm and decided in his judgments. He was largely engaged in affairs; was connected with moneyed institutions; had succeeded in accumulating wealth by his own efforts; was associated in large and legitimate enterprises of commerce. His general health was good for a man of his advanced age—seventy-five years—although he had suffered injuries from a fall, and had had epilepsy; but these occurrences were not proven to have affected his general capacity to transact business, nor did his delusions appear only after these events occurred—on the contrary the fact was that he entertained them quite as stubbornly before, as after such events happened.

Now there was nothing whatever to connect any of these aberrations or infatuations of the testator with the provisions of his will, or with any one of them. Hence, although his mental peculiarities were confined to one class or correlated system of delusions, they did not affect his testamentary disposition of his property, and there could not therefore have been a successful impeachment of his will on the gound of monomania or partial insanity. The very able and astute counsel of the contestants, therefore sought to make these facts the bases of a contention of general insanity. Here were phases of an extravagant and exaggerated belief, widely variant from the ordinary standards, so much so that in their ramifications and details they seemed to include many subjects, allied, it is true in one sense, but in another they were wild fancies, delusions and incoherences, betokening a frenzied condition of mind. Should such a man, who even in his last illness confided to his physician his conviction of many of his notions, be regarded as possessing that calm and sober judgment which would enable him, after taking a deliberate survey of his situation, to make a rational disposition of his estate? His beliefs, his acts, his follies, his diseases, all threw about him the suspicion of lunacy, a suspicion which it was claimed, was ripened almost to a certainty that he was not conscious that in leaving his great property to charitable and religious uses and purposes, he was committing an injustice to his posterity, which were he sane he would never have contemplated doing.

A careful consideration of the proof in this case will show, that the testator's condition of mind was either that of a monomaniac, or merely of a person of enormous credulity upon theoretical and abstract subjects, of the value of some of which he attempted to judge by practical experiment. All his delusions were connected with such matters, which did not and could not have any effect or influence whatever on the dispository act of a man constituted as he was in other respects. Mesmerism, clairvoyance, divining and mineral

rods, and the whole arsenal of Doustersswivelian tools; dreams, and spiritual contacts and influences, were not in his case original creations of his perverted fancy. They were the results of reading, association, education, and possibly of hereditary and family influences extending through generations. And so the learned Surrogate (Bradford) regarded them. He wisely applied to the circumstances of the case, the inferences to be drawn from the history of such phenomena as constituted the testator's stock of ascribed delusions—referred to the difficulty of the ascertainment of precise conditions of mind, and after adverting casually to the doubtful frontier which separates madness in its various forms and shades from sanity (a topic which Dr. Maudesley has lately elaborated in his comments upon cases lying in the border land, between soundness and unsoundness of mind), he proceeds to consider the reasoning which induces a reliance upon such circumstances as those involved in this case, as establishing a general insanity, and brands that reasoning as fallacious. The conclusion he arrives at is well worthy of citation. He says, "the danger of this kind of reasoning lies in regarding, as indications of radical disease, mental phenomena existing in all ages and among all classes, and dependant upon natural faculties and propensities, or arising from adventitious circumstances of early impression and education." "Being of impression that mere speculative belief does not of itself afford a clear test of insanity, I do not esteem the peculiar opinions entertained by the decedent, sufficient to establish mental derangement."

The Surrogate decreed in favor of the will, and the Supreme Court sustained his decree.

I must leave this case and many very useful and pertinent suggestions arising from it, to consider before closing some of the illustrations furnished of the views I have been endeavoring to expound, by the recent case of the Bonard will. This case is of the very greatest value, for in addition to the facts which transpired in it being such as to present very

distinctly the question of the testamentary capacity of one who entertained singular tenets of a so-called faith, it was a cause tried and argued with great skill and unusual ability and one in which the testimony of the medical experts was sifted with a thoroughness and minuteness which elicted much instruction upon the more obscure phenomena of mental disease.

Louis Bonard, a native of France, died at the City of New York, in the Roman Catholic Hospital of St. Vincent, on the 20th day of February, 1871. His life had evidently been an eventful one, for while the testimony leaves in doubt much, and fails altogether to account for more of his antecedent history, it was known that he had been a traveler, and a trader in South and Central America, and that he had been a dealer in sham jewelry; that he came to this country some time prior to the year 1855, and had brought with him money; that he had had losses, but at length became successful, and made investments in real estate, which enabled him to accumulate a fortune amounting at the time of his death to about one hundred and fifty thousand dollars. During the period of his residence in New York he lived as a miser; he preferred the society and companionship of artisans and mechanics. He had no relations in America—nor in Europe so far as was ascertained at the time of the trial—although it has since transpired that he had kindred in France. He was a man of erratic habits, and singular beliefs, the latter of which seemed to intensify as his age advanced. He was a misanthrope, but was possessed of an unbounded affection for the brute creation. The evidence shows that he was a believer in metempsychosis; that he expressed the opinion that there might be an Emperor in any animal he beheld; that he remonstrated with a person who suggested it would be humane to kill an injured kitten, because he averred there was a human soul in the animal's body. But he was a man dexterous and cunning in mechanical arts. He constructed machines for various purposes; he had mental resources

likewise, and was a reader of books. I think the testimony fairly viewed, established that he railed at religion and priests—that he denounced the Church in which he was born, but notwithstanding his invectives against it, he died in the peace of the Roman Catholic Church and in its full communion.

There appeared also the fact that Mr. Bonard combined with his ardent love of animals an unbounded admiration for the benevolence of Mr. Henry Bergh. Memoranda were found among his papers, which plainly showed he had some ulterior purpose concerning that gentleman. On the 11th February, 1871, and while he was very ill, he made a will bequeathing a portion of his property to two of his friends. On the 13th he made another, revoking the former, and left all his estate, real and personal, to the Society for the Prevention of Cruelty to Animals, of which Mr. Bergh was then as he is now the honored President.

Here was a case bold in its outlines and presenting the salient feature of a dogma of a heathen creed, constituting the avowed belief of a man who was born and who died in the Catholic faith. The contestants of his will, who sought to avoid it on the ground of want of mental ability, relied upon the proof of this belief, so unusual among Europeans and Americans, and on that evidence which was offered to show the peculiarities of his character and conduct, as establishing unsoundness of mind in the form of monomania.

The medical experts did not regard the entertainment of the belief in metempsychosis by Mr. Bonard, as evidence of an insane delusion. One of the very learned physicians who testified in the case did not find evidence of "*positive* irrationality" in the circumstance that a man of wealth who lived in one of the poorest districts of the city, in a cheap boarding house, on being taken ill and believing that his soul was about to pass into the body of an animal, left all his possessions to a Society, the only object of which was to protect animals. Another physician of very eminent au-

thority in this class of cases, declared that under such circumstances the belief mentioned should not be regarded as insane delusion—and for the reason that if the conviction had the dominion over him which a delusion would have had, it would have in some manner betrayed itself in the language or in the provisions of the instrument; that if Bonard held as real matter of religious conviction the belief that his soul would migrate to a habitation in the body of an inferior animal, that that would have been expressed or in some way manifested in the will. The same gentleman says, that "no religious belief, no matter how absurd it may be, is of itself sufficient evidence of a man's insanity;" but what is exactly *religious* belief and what is not, was of course not attempted to be explained.

The opinion of the Surrogate in this case is very able and interesting. He declares that the belief which Mr. Bonard held did not constitute insanity; that "if a Court is to ascribe insanity to a man or a class of men constituting a sect, according to his or their opinion or belief as to a future state, and a particular sect had in fact attained to a real knowledge of that future, the logical deduction would necessarily be, that a major portion of all mankind comprised in all other and different sects were of unsound mind, or monomaniacs on that subject." The learned Surrogate then proceeds to consider the facts of this case not as presenting one of general insanity, but as one in which the only appearance of unsoundness of mind consisted in the alleged monomania concerning the transmigration of souls. But he gives effect to the fact that there was no connection necessarily of this belief with the terms of the will—that there was nothing *in the will* to show that he held the opinions alleged any more than that he was impressed with a belief in utter annihilation after death; nor was there any testimony to associate any provision of the will with a belief respecting the future condition of the human soul. These considerations, coupled with the further fact that "the testator had neither wife nor child,

father or mother, or any known, near or remote relatives living, or others on whom he was or felt himself under obligation to bestow his property," induced the Court to sustain the will and overrule the allegation of mental incapacity.

Such was, in brief (in the medico-legal aspect of it), the celebrated Bonard will case, and such was the wise and proper disposition made of it. But one step further however, and the will could not have been properly sustained, had Bonard's relatives appeared to contest it. Introduce one little circumstance into the narration, an additional factor into the computation, and the harmless humor or conceit of Mr. Bonard would have become aggravated into an insane delusion, such as the law would have regarded fatal to testamentary power. For instance (and it points the rule with great clearness), suppose Mr. Bonard, holding the opinion that the souls of men after death infuse themselves into the bodies of brutes, had learned before he made his will that Mr. Bergh had announced (as he did after Bonard's death), that it was his intention to dispose of a part of that which should be left to the Society for the Prevention of Cruelty to Animals by Bonard, in the application of carbonic acid gas to the suffocation of vagrant dogs who should be captured in the midsummer raids and carried to the public pound for execution. Suppose that Bonard, apprehending that after his decease his soul might pass into the body of such an animal (the vicissitudes of whose uncertain city life might lead him finally to such a doom), should have provided in his will against the possibility of the abridgement of his translated life by his own money, at the instigation of his own friend, his chosen posthumous almoner. To consider so is not to consider too curiously—for many wills have contained even stranger provisions than such an one would have been. This would have indicated that the dispository provisions were intended by the testator for his own physical comfort and benefit in another sphere of physical existence, and would have furnished one and the principal element of that quality of un-

soundness of mind which the law recognizes as such in cases of disputed wills. Where the grotesque idea is the basis of a belief so sincere as to lead to its incorporation in the will, and to be indubitably the producing cause of its provisions, it affects the testamentary act and is evidence of the diseased condition of mind.

I must resist the temptation to pursue the subject further.

To summarize by way of conclusion the views I have endeavored to present in the foregoing observations:—the law as it now stands and should be administered upon the subject of partial insanity (and almost all the cases of partial insanity are cases of monomania purely), is of comparatively recent origin; it is the product of improved knowledge respecting the diseases of the mind, and of more liberal as well as accurate views respecting the freedom of the will, and the restraints proper to be put upon testamentary powers. It consists of a rule susceptible of application to all cases of the character under consideration; but one which is affected by the general tendency of Courts to revert to antiquated ideas upon topics resting purely in authority; a rule which is liable to be lost sight of in the attempt to find in cases of monomania, evidences of a general insanity. It does not require that to prevent the making of a valid will, a man shall be bias and thwart in all his mental processes; but it is a rule which discriminates in favor of those who are the natural objects of his bounty and affection; and it prevents injury and injustice being done to such, because of a testator's delusions, fancies and irrational prejudices, in cases where they have evidently affected his acts; but it does not deny the testamentary privilege to the man whose eccentricities, beliefs, follies or infatuations may be as absurd and fantastic as the incoherences of a half-remembered dream, provided in all other affairs of life he is of competent judgment, and his vagaries have not led him to do injustice to his kindred, or to harden his heart against those who are the proper objects of his testamentary bounty.